

**TESTIMONY OF
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**BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
“OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION - THE
700 MHz AUCTION”**

April 15, 2008

Mr. Chairman, Congressman Stearns, and members of the Subcommittee, thank you for calling this hearing to address the outcome of the Commission’s most significant spectrum auction to date. The distinguished members of this Subcommittee fully recognize that broadband infrastructure is one of the best tools for promoting communications and the entrepreneurial spirit that we have seen in our time. The results of this auction must be measured with an eye to its impact on broadband, whose deployment is the central infrastructure challenge of this Information Age. Broadband infrastructure, and in particular, ultra-high speed broadband is critical to promote the economic, cultural, and social well-being of our country, particularly for small businesses and entrepreneurs, who drive so much innovation and economic growth. Broadband networks also offer unprecedented opportunities for improving and harmonizing the capabilities of our public safety community.

All of us were keenly aware going into the 700 MHz auction that its outcome would profoundly impact the future role of wireless broadband services, potentially offering needed competition to existing wireline broadband providers, facilitating deployment to rural areas, and creating opportunities for enhanced public safety communications. With such a significant block of spectrum up for auction, there was rightly a great deal of diverging pressures on the Commission to construct a 700 MHz band plan and service rules that would meet a wide-range of interests.

In responding, we could have stuck to what's tried and true. We could have declined to adopt any controversial conditions to open the market. We could have stuck with our traditional substantial service constructions standard. We could have allowed public safety agencies to fend for themselves in trying to develop a long-awaited interoperable network. But because our job is to promote the public interest, the status quo was not an option. We heard from a chorus of voices expressing concern about the lack of broadband competition, and the need to promote advanced services in rural and other underserved areas, and the unmet needs of public safety. We obviously fell short of delivering everything consumers, innovators, public safety and carriers wanted. But we have to some extent accelerated the next generation of wireless broadband services and have begun to change the way U.S. consumers receive their wireless services.

In particular, I'm pleased that the auction results triggered the open access requirements on the C Block, offering consumers a new paradigm that they have longed for and certainly deserve. Our decision to include these conditions, though modest in its application to a 22 MHz swath of spectrum, has redirected our future approach to

spectrum policy in allowing for an open access regime for devices and applications. Despite technological advances like Wi-Fi, WiMax and more advance mobile services, consumers have been frustrated by arbitrary limitations on the types of devices and functions they can access. Our approach is leading to benefits for the many consumers who so desperately want the unfettered ability to use any wireless handset and download any application they want on their wireless network. And while some tout the U.S. handset market as competitive and robust, still under 9 percent of wireless devices are unlocked.¹ Indeed, in contrast to the handset market in Europe and Asia where handset portability is only a matter of switching out a SIM card, here in the U.S., while the variety of handsets may be increasing and the market evolving, the consumer is still largely constrained by the handset choices offered by its wireless provider. The open access requirements on the C Block will, without a doubt, improve the consumer experience.

It appears the impact of this singular condition goes beyond those consumers using the C Block spectrum. It also means progress for wireless innovators – application developers, manufacturers, and carriers alike who will now be unleashed to bring new multi-media products to market for use on this and potentially other spectrum. The Internet has been a source of remarkable innovation and an engine for economic growth and productivity. It is critical that we bring the benefits of the Internet to the wireless world. I believe our decision to open the C block spectrum takes us in that direction.

¹ See Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC WT Docket No. 08-27; RM-11361 at 1, 7 (filed March 20, 2008) (noting that of “620 wireless devices” identified by CTIA, “54 handsets are offered on an unlocked basis.”)

It's telling that just a few months after adopting the 700 MHz rules and prior to the start of the auction, several carriers announced plans to voluntarily open their networks. We now see industry leaders joining forces to form a broad alliance of leading technology and wireless companies through the Open Handset Alliance. This multinational alliance of technology and mobile industry leaders has developed the first open and comprehensive platform for mobile devices, Android. And in the interest of supporting the developer community and sparking innovation on the Android platform, Google announced the Android Developer Challenge, which will provide \$10 million to developers who build mobile applications for Android. This type of innovation and open collaboration can only give consumers a richer, more worthwhile experience than what they have today. We have also seen the two largest carriers following suit. Prior to successfully bidding on the C Block spectrum, Verizon Wireless pledged to provide customers with the option to use, on their nationwide wireless network, wireless devices, software and applications not offered by the company. CEO Lowell McAdam has characterized this move as "the next level of innovation and growth."² Similarly, AT&T has indicated that it, too, will allow customers the option to use compatible handsets not offered by the company on its nationwide wireless network. These are significant outgrowths of the open access condition that should prove to be a clear win for consumers. But our job is far from complete. It will be critically important for us to continue to assess the implementation of our open access requirements on the C Block as well as the extent to which open access actually develops on other spectrum. As we move forward, we must do so with cautious optimism.

² See <http://news.vzw.com/news/2007/11/pr2007-11-27.html>, "Verizon Wireless To Introduce 'Any Apps, Any Device' Option For Customers In 2008 - New Open Development Initiative Will Accelerate Innovation and Growth", Released Nov. 27, 2008 (last visited April 14, 2008).

Ideally, this auction would have facilitated the emergence of a “third” broadband channel to provide consumers everywhere the benefits of a competitive, high-quality wireless broadband network. Unfortunately, the fear I expressed at our July open meeting adopting these rules came true: we missed a golden opportunity to open that elusive third channel into the home. This will be viewed in the long-run as one of the greatest failings of this auction and of recent Commission policy. I advocated then and continue to believe that a truly open wholesale model could stand as a breeding ground for innovation, for allowing new and diverse competitors to flourish, and for spurring unparalleled levels of competition into the broadband marketplace. I believe such a model could facilitate opportunities for small and rural carriers as well. While the auction outcome represents progress for consumers in terms of new openness for devices and applications, we should have done more to promote open markets by adopting a wholesale model to attract vigorous competitive alternatives.

It is also appalling that women and minorities were virtually shut out of this monumental auction. Indeed, the data shows that women-owned bidders failed to win any licenses, and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses, or .64%), despite the fact that women constitute over half the U.S. population and minorities around one-third of the U.S. population. It is unfortunate that we have again failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. In so doing, we failed to meet the statutory requirement in section 309(j) of the Act to “ensure that small businesses, rural telephone companies and businesses owned by members of minority groups and

women are given an opportunity to participate in the provision of spectrum-based services.”³

It is troubling that we lost an opportunity to provide crucial bidding credits across the entire 700 MHz spectrum to designated entities that wholesale fully built-out network services. The bidding credits made available through our designated entity program can be a potent means of getting spectrum into the hands of small businesses and entrepreneurs. I think it is essential that we revisit our policies in this respect to ensure that all bidders have opportunities to bid, particularly where wholesale service is a compelling option for new and diverse providers.

As we look at the results of the auction and its structure, some have argued that a more flexible band plan which included a mix of licenses could better support a variety of business plans. On the other hand, it was apparent that a larger spectrum block could best address the needs of potential new entrants, who expressed interest in providing a nationwide wireless broadband service. Ultimately we had to strike a compromise – and while the measures we took were less than what I would have proposed, they were significant.

It is widely recognized that the tragic failure to sell the D block represented a lost or at best delayed opportunity to come to grips with our country’s public safety dilemma. Policymakers all agree that our first responders need the best technology and communications network possible. Many of our nation’s public safety agencies already suffer from antiquated systems and struggle to keep pace with new technological

³ See 47 U.S.C. § 309 (j)(4)(D).

opportunities. Yet to date, there have been no other viable plans brought forward to realize the critical need for an interoperable broadband network for public safety.

The implementation of a shared commercial and public safety network presented a myriad of complex and novel issues. In adopting these rules, I questioned our approach and raised the concern that there was no guarantee that the model we created, as structured, would nurture a nationwide interoperable public safety system that would be both commercially viable and technically feasible. Though I would have preferred direct Federal funding for building a national public safety broadband network, I was nevertheless painfully aware that the public-private partnership framework itself presented the only option available to us. And while this approach could have succeeded, the rules we ultimately adopted simply did not reach the appropriate balance to meet the needs of both a commercial partner and public safety. And while I advocated and fully supported modifications to the rules, including waiving a portion of our designated entity rules to allow a D Block winner to wholesale greater than 50 percent of the spectrum, and reducing the additional default payment percentage, these after-the-fact remedies were just not enough to woo a successful bidder.

So as we look to revisiting the rules for the D Block, we need to explore all aspects of proposals intended to help public safety keep apace through this auction. A true public-private partnership must meet the needs of both partners. If public safety's needs are not met, the basic objective is not met. If a private partner's need for a return on capital and regulatory certainty are not met, then that partner will not be in a position to attract the capital necessary to meet public safety's objectives. A partnership is just that, and both sides must win to make it work.

We need to do a top-to-bottom review of what went wrong so we can make it work in the next round. We will need to work closely with our friends in public safety, as well as potential private sector partners, and the financial community who may provide the capital, to find a balance that works for all parties.

First and foremost, we must provide upfront appropriate and detailed guidance to allow parties to make a bona fide financial viability assessment. In the notice of proposed rulemaking I anticipate the Chairman will circulate, we need to step further back than only looking at reducing the reserve price or modifying the buildout requirements. We need to peel back the onion to the core framework to seek comment on all aspects of the re-auction. While I continue to believe that the public-private partnership can succeed, we certainly need to seek the public's comment on alternatives and modifications to that model. We should also look at whether alternatives exist to nation-wide licensing, regional or otherwise, that might attract bidders and still serve the needs of public safety. And, in light of auction results on the other 700 MHz blocks, we should seek comment on whether we should consider limiting eligibility for the D Block re-auction and if so, in what way. Can and should the Commission use this re-auction as an opportunity to balance the goal of providing an interoperable broadband communications network for public safety with that of facilitating a new entrant? What type of re-auction provisions should be included? What technologies and features are feasible? How do we better define the role of the Public Safety Trust and its interplay with the commercial entity? What additional licensing term flexibilities might create incentives for bidders?

I do not have the answers to these and the many other questions that need to be asked about the re-auction of the D block spectrum. In order to move forward successfully, we will need to rely on the input of this Subcommittee, private sector partners, the financial community, as well as public safety. Only with this vital input will we be well positioned to provide detailed guidance on the many elements of a re-auction.

Mr. Chairman, thank you for calling this timely hearing on post 700 MHz auction issues. I look forward to hearing from you and all the members of the subcommittee on this issue, as well as any other issues of concern.